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Supreme Court of the United States

OCTOBER TERM, 1949
No. 485

ROSE W. SHAIN,

Petitioner,

against

MARK SHAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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No.

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MARK SHAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of ROSE W. SHAIN prays that a writ of certiorari issue to review the decree of the Supreme Judicial Court of the Commonwealth of Massachusetts, entered on the 19th day of September, 1949, affirming the decree of the Probate Court of the Commonwealth of Massachusetts, County of Norfolk, sustaining the respondent's plea to the jurisdiction and dismissing the petition of the petitioner herein for a separate support.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported in the Advance Sheets of the Opinions of the Supreme Judicial Court of the Commonwealth of Massachusetts (1949), 923-26.

The opinion of the Probate Court is contained in a report of the material facts at R. 8-24.

JURISDICTION

The decree of the Supreme Court of the Commonwealth of Massachusetts, the highest court of that State in which a decision could be had, was entered on the 19th day of September, 1949.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended, Title 28 U. S. Code, Section 1257 (3).

STATEMENT OF FACTS

The petitioner herein originally brought a petition for separate support in the Probate Court of the County of Suffolk on December 19, 1931, seeking support for herself and her minor children (R. pp. 1, 2). The respondent herein filed a plea to the jurisdiction, alleging that the Probate Court of the County of Suffolk was without jurisdiction in the matter, on the ground that neither party was a resident of the County (R. p. 2). Upon motion of the petitioner herein, the case was transferred to Norfolk County (R. p. 3). The respondent herein, after a period of ten years, amended his plea to the jurisdiction, alleging that on the 12th day of August, 1941, he obtained a divorce from the petitioner herein in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and consequently any decrees issued by the Probate Court of the County of Norfolk upon the petition for separate support

would be of no effect and that the court was without jurisdiction over the respondent herein.

The respondent herein also filed a petition to dismiss, which petition, as finally amended, alleged that the petitioner herein was guilty of laches for failure to prosecute diligently (R. pp. 6, 7).

The Probate Court, after hearing the evidence on the plea to the jurisdiction and the petition to dismiss, entered a decree denying the petition to dismiss and sustaining the plea to the jurisdiction, and decreed that the petition for separate support be dismissed (R. p. 52).

The Probate Court made a report of the material facts, in which the court found that the petition for separate support was filed on December 19, 1931, that no action was taken thereon until 1946 other than the issuance of an injunction in Suffolk Probate Court in June 1938, restraining the respondent herein from prosecuting a suit for divorce in Florida, which injunction was dissolved in December 1938, and the case transferred to Norfolk County Probate Court (R. pp. 8, 9).

The court found that the plea to the jurisdiction, as amended, was based on a decree of divorce obtained (ex-parte) by the respondent herein in the Second Judicial District Court of the State of Nevada for the County of Washoe. The Nevada decree was granted "after personal service" was made on the petitioner on July 10, 1941, by delivering to her in hand in Massachusetts a certified copy of the Nevada summons, and that the petitioner did not appear or participate in the Nevada proceedings (R. p. 10).

The respondent herein is a member of the Massachusetts bar and has professional cards and letterheads which read: "Member of the Massachusetts bar, permanent address Reno, Nevada". Since before 1931, the respondent herein has maintained a listing in the Boston telephone book, wherein his address is listed as 178 Lincoln Street, Boston, Mass. (R. p. 10).

The respondent herein left Boston during the summer of 1931 and went to New York City, where he established a domicile and where he lived until 1938 (R. p. 10). While in New York the respondent herein obtained a Mexican divorce on October 5, 1931. Neither the respondent nor petitioner herein were ever domiciled in Mexico, and there was no contention that the Mexican divorce was valid (R. p. 11). The respondent herein left New York City early in the year 1938 because of ill health and established a residence in Florida until September 1940. While living in Florida, the respondent herein filed a petition for divorce, and on motion of the respondent these proceedings were dismissed on July 30, 1941 without hearing on the merits (R. p. 11).

The respondent left Florida and went to Reno with, as the court found, the intention of establishing a domicile in that state to restore himself to good health; to "get liberated from an unfortunate marriage"; and to "find peace". He arrived in Reno on September 6, 1940 and resided at the Parkway Hotel until November 1, 1940 (R. p. 12).

He left Reno on November 1, 1940 at the suggestion of physicians to consult with doctors at San Francisco and at the time he left, he left two trunks and two suitcases at the Parkway Hotel.

He left San Francisco on November 10, 1940, stopped at Reno on November 11, and arrived in Los Angeles on November 12 where he remained until January 12, 1941. The winter seasons at Reno were too cold for the respondent herein (R. p. 13). He went to Las Vegas, Nevada on January 13, 1941, remained a few days, then returned to Los Angeles where he remained until March 8, 1941 (R. p. 13).

On March 8, 1941 he returned to Reno, stopping for one day and then proceeded to Cuba where he stayed until April 23, 1941 (R. p. 13). He then went to Miami Beach, Florida, and remained there until May 30, 1941. On May 30, 1941 he returned to Cuba where he remained until June 10 and returned to Miami Beach, Florida, where he stayed until June 13, 1941 (R. p. 13).

On June 15, 1941 he left Miami Beach, Florida and arrived in Reno, Nevada on June 18, 1941, living at the Parkway Hotel until June 21, 1941, at which time he moved into the Ridgeway Apartments where he resided from June 21 to October 21, 1941 (R. p. 14).

The respondent herein filed his complaint for divorce in Reno on July 2, 1941 and the decree of divorce was entered on August 12, 1941 (R. pp. 23, 24). The cause for divorce alleged in the Nevada complaint was that the parties had lived separate and apart for three consecutive years immediately preceding the commencement of the action.

The respondent herein wrote three letters, one to his son, one to his wife, and one to his daughter, which the court reported as facts considered by the court in arriving

at its decision, which letters were marked as Exhibits 57B, 2A and 3A (R. pp. 19-22).

Exhibit 57B was a letter addressed to his son dated January 29, 1941, in which respondent herein stated that if his condition improved he would take his son with him and settle either in Florida or California because he was not permitted to live in a cold climate (R. p. 19).

Exhibit 2A was a letter dated May 27, 1941, written to the petitioner herein in which he stated the reason he was seeking a new divorce was that he had been advised that there was some question as to whether his Mexican divorce would be considered valid in Massachusetts, and that he did desire to reside in Boston some day. He also suggested that if the petitioner herein preferred, she might file divorce proceedings in Boston or she might permit the respondent herein to obtain one in Florida or elsewhere (R. pp. 20, 21). In a postscript to this letter he stated that he would probably leave Florida for California or some other place (R. p. 22).

Exhibit 3A was a letter dated June 12, 1941, less than a week before the respondent herein left Florida for Reno, Nevada, in which letter he states that the status between the petitioner herein and himself is such that he cannot return to Boston without risking a complete collapse, and that only when the settlement has been effected, which means a divorce, will his health warrant his ultimate return to Boston (R. p. 22). In a postscript to this letter he states that he had received a reply to his letter of May 27, 1941 to the petitioner herein and that there remains nothing more to say.

The Probate Court found that while the absence of the respondent herein from Reno between November 1, 1940 and June 18, 1941 might have been suspicious, nevertheless, respondent's absence from Reno during that period was expedient and that he intended to return to Reno without delay, and found that the respondent herein had never given up his Reno residence which was established on September 6, 1940, and that on July 2, 1941 he was a bona fide resident of Reno and that the Reno divorce was valid (R. pp. 23, 24).

On or about the 13th day of August 1948, petitioner herein appealed from the said decree of the Probate Court, dated July 27, 1948, to the Supreme Judicial Court of the Commonwealth of Massachusetts. The Supreme Court found that the divorce obtained by the respondent herein in Reno, Nevada, was valid since respondent herein had established his domicile in Nevada nearly ten months before he filed his divorce suit and that therefore the courts of Nevada acquired jurisdiction to grant the divorce. The Supreme Court of the Commonwealth of Massachusetts also found that according to Sec. 6405 of the Nevada Compiled Laws (1929) respondent herein had not lost his domicile in Reno through his absence from the State of Nevada between November 1, 1940 and June 18, 1941, since the respondent herein was compelled to leave Nevada for reasons of health, and had the intention of returning to Nevada, and therefore, the time of said absence should not be considered in determining the fact of residence, pursuant to Section 6405 of the Nevada Compiled Laws of 1929.

SUMMARY OF STATUTES INVOLVED

Article IV, Section 1, of the Constitution of the United States:

"Full faith and credit.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Amendment XIV, Section 1, to the Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Massachusetts Statute

G. L. (Ter. Ed.) c. 208, s. 39 is as follows:

"S. 39. A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause

which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

Nevada Compiled Laws of 1929

Sec. 6405 *"Legal Residence Defined — Proviso*

"The legal residence of a person with reference to his or her right of suffrage, eligibility to office, right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence is that place where he or she shall have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him or her; provided, however, should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence."

Section 9460 *"Six Weeks Residence — Causes for Divorce*

"Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following cause, or any other causes provided by law:"

(The causes are (1) impotency, (2) adultery, (3) desertion, (4) conviction of felony, (5) drunkenness, (6) cruelty, (7) neglect to provide and (8) insanity.) (Effective May 1, 1931.)

SPECIFICATIONS OF ERRORS TO BE ADVANCED

The Courts below erred:

1. In upholding a Nevada decree obtained without compliance with the minimum jurisdictional requirements of the State of Nevada.

2. In according full faith and credit to a Nevada decree obtained in violation of procedural due process.

3. In finding that the respondent herein had acquired a bona fide domicile in Reno, Nevada.

4. In finding that the Nevada Court had obtained jurisdiction to grant the divorce in spite of the fact that the respondent herein had not even complied with the minimum jurisdiction requirements, to wit, a residence of six weeks in the State of Nevada before starting a divorce suit.

5. In considering respondent's prior residence and his absence from the State of Nevada in determining the fact of such residence.

6. In declaring the Reno divorce valid in spite of the fact that no personal service was made on the petitioner herein and that she had never appeared in the Nevada action.

REASONS FOR GRANTING THE WRIT

The state courts below have decided the federal question of substance, raised by the plea of the respondent herein to the jurisdiction of the Massachusetts courts in reliance upon the Nevada decree of divorce (R. pp. 3, 4), in a way that deprived the appellant of due process of law. The substantial federal questions involved are:

1. Should the Supreme Court reconsider the rule laid down by that court in the case of *Williams* v. *North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, and return to the rule laid down in *Haddock* v. *Haddock,* 201 U. S. 562, 26 S. Ct. 525?

2. Is a divorce decree obtained in a state where the plaintiff is not legally domiciled entitled to full faith and credit by a court of a sister state?

3. Is a divorce decree obtained without compliance with the minimum residence requirements on the part of the plaintiff entitled to full faith and credit by a court of a sister state?

4. Whether due process requires that no other jurisdiction shall give effect, even as a matter of comity, to an invalid judgment elsewhere acquired?

SUMMARY OF ARGUMENT

POINT A

Due process of law requires that the Supreme Court adhere to the principles of law enunciated in the case of *Haddock* v. *Haddock* and refuse to follow the principle of law in the case of *Williams* v. *North Carolina* (first Williams case).

POINT B

The Court below erred in holding that the respondent had acquired a domicile in Nevada and that therefore the Nevada courts had jurisdiction to grant a divorce.

POINT A

Due process of law requires that the Supreme Court adhere to the principles of law enunciated in the case of *Haddock* v. *Haddock* and refuse to follow the principle of law in the case of *Williams* v. *North Carolina* (first Williams case).

The Court below held that the jurisdiction of the State of Nevada to grant the divorce depended upon the respondent having acquired a domicile in Nevada and cited, in support of this ruling, *Bell* v. *Bell,* 181 U. S. 175, and *Williams* v. *North Carolina,* 325 U. S. 226.

It appears, however, that the case of *Bell* v. *Bell, supra,* was decided under the former principle enunciated by this Honorable Court in the case of *Haddock* v. *Haddock,* 201 U. S. 562, 26 Sup. Ct. 1905. In the case of *Bell* v. *Bell, supra,* as well as in the case of *Haddock* v. *Haddock, supra,* this Honorable Court held that no valid divorce can be decreed on constructive service.

It is uncontested that the petitioner in the instant proceeding was served by constructive service and that the so-called personal service outside of the State of Nevada, to wit, in the Commonwealth of Massachusetts, was nothing else but constructive service.

It is true, however, that this Honorable Court has reversed the rule in the case of *Haddock* v. *Haddock, supra,* which had been law for almost forty years, in the case of *Williams* v. *North Carolina,* 317 U. S. 287. However, in view of the increasing confusion and uncertainty with respect to foreign divorces which has resulted from the

decision in the *Williams* case, *supra,* this Honorable Court is most respectfully urged to reconsider the rule laid down in the first *Williams* case, *supra,* and reinstate the former rule of *Haddock* v. *Haddock, supra.*

In view of the increasing criticism of the inequities and the deprivation of due process, resulting from the decision in the first *Williams* case, *supra,* as best expressed in the dissenting opinion of Justice Jackson in the case of *Rice* v. *Rice,* 69 Sup. Ct. 751, in which Justices Black, Douglas and Rutledge joined, it is time for this urgent question to be revaluated in the light of the anomalous situation which has arisen with respect to foreign divorces in the past few years. As Justice Jackson states in the dissenting opinion of *Rice* v. *Rice, supra,* at page 753:

> "This Court, while acknowledging that personal service of process on the defendant ordinarily is necessary to a valid judgment in a personal action, held in the first Williams case that a state could bring a nonresident defendant within its power merely by publication or out-of-state service of its summons. It overruled former decisions to introduce what it has aptly characterized in Sherrer v. Sherrer, 334 U. S. 343, 349, and 356, 68 S. Ct. 1087, 1090, note 11, and 1097, as the 'ex parte divorce.' To me ex parte divorce is a concept as perverse and unrealistic as an ex parte marriage. The vice of the system sanctioned in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A.L.R. 1273, is that one of the parties may leave the state where both for years have made their home, seek a forum of his choice, and pretty much on his own terms alter the pattern of two lives without affording the other even a decent chance to be heard—as this case illustrates.

> Lillian either had to leave her teaching and means of support to follow her husband two thousand miles from any place where she ever had lived, or let her marriage go by default. If she chose to follow and contest under Nevada law, she had little real chance to succeed. But this Court had called this due process of law for Lillian."

So in the instant case, the lower Court, following the rule laid down in the first *Williams* case, *supra,* called this due process of law for Rose.

The writer is of the opinion that the facts in the instant case indicate the extremes to which a spouse seeking his freedom may go in establishing a fictitious residence for the purpose of obtaining his freedom. The respondent herein became almost a professional itinerant in the course of "shopping around" for a jurisdiction suitable for his purpose and even when he found the jurisdiction which he considered desirable he failed to comply with the minimum jurisdictional requirements of residence in that jurisdiction, as will be fully discussed in the next point.

Since under the rule laid down in the first *Williams* case the domicile on the part of the plaintiff in Nevada is sufficient to confer jurisdiction on the Nevada courts, it becomes easy for one spouse to create a fictitious domicile in Nevada and obtain a divorce without the knowledge of the other spouse.

The rule laid down in the first *Williams* case although, technically, seemingly protects the rights of a defendant, a divorce suit instituted by the constructive service of process does not, in practice, protect a defendant because a plaintiff seeking a divorce upon grounds not recognized

in the state in which the defendant resides, and in which the plaintiff formerly resided, will practice fraud upon the defendant by presumingly establishing a residence in another state for the purpose of instituting such divorce by constructive service. This situation can only result in place upon the spouse, who is usually innocent in the situation, the burden of retaining counsel in a foreign state in endeavoring to contest the jurisdiction of the court by reason of the fictitious domicile. In practice, experience has demonstrated that such contest is always decided against the defendant.

It seems intolerable that the rule of law enunciated in the first *Williams* case should be continued when it does appear that the observance of that rule creates injustices which are irremedial.

POINT B

The Court below erred in holding that the respondent had acquired a domicile in Nevada and that, therefore, Nevada courts had jurisdiction to grant the divorce.

It is argued under Point A that the decree of divorce obtained by the respondent in Nevada is invalid since the petitioner herein was served by constructive service and such a service does not comply with due process, in accordance with the sound law expressed by this Court in *Haddock* v. *Haddock, supra.*

Assuming, however, that the constructive service on the petitioner herein would be due process, under the rule laid

down in the first *Williams* case, *supra,* the Reno decree would still be invalid under the rule laid down in the second *Williams* case, to wit, *Williams* v. *North Carolina,* 325 U. S. 226, 65 Sup. Ct. 1092. This is so because the respondent had not acquired domicile in Nevada and did not even comply with the minimum residential requirement, to wit, the six-week residence in the State of Nevada, before commencing his suit for divorce. As this Court in the second *Williams* case, cited *supra,* stated at page 1095:

> "*Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile.* Bell v. Bell, 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804; Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicile of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted." (Italics writer's)

Although the Courts below found that the respondent had acquired domicile in Nevada, petitioner is nevertheless entitled to a review of this question by this Honorable Court. The finding is not, in reality, a finding of fact but a conclusion as to the jurisdiction of the Nevada courts. As this Court further stated in the second *Williams* case, *supra,* at page 1098:

> "State courts cannot avoid review by this Court of their disposition of a constitutional claim by cast-

> ing it in the form of an unreviewable finding of fact. Norris v. Alabama, 294 U. S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074."

The Courts below have accorded full faith and credit to the decree obtained by the respondent in Nevada in spite of the fact that the respondent had not acquired domicile in Nevada and did not even comply with the jurisdictional minimum requirements of said state. Such a decree is not entitled to full faith and credit and should not have been given effect even as a matter of comity. As this Honorable Court stated in *Griffin* v. *Griffin*, 327 U. S. 220, 66 Sup. Ct. 556, at page 560:

> "A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. National Exchange Bank v. Wiley, 195 U. S. 257, 25 S. Ct. 70, 47 L. Ed. 184; Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 23, 27 S. Ct. 236, 241, 51 L. Ed. 345; Baker v. Baker, Eccles & Co., 242 U. S. 394, 401, 37 S. Ct. 152, 154, 61 L. Ed. 386. Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, Sec. 11, Comment (c)."

A perusal of the record in the instant case shows that the respondent had never acquired domicile in Nevada but was a traveller seeking a divorce haven. On October 5, 1934, he filed a divorce action in Mexico, without the knowledge of petitioner, and obtained a divorce decree in that country which is, of course, invalid (R. 11). In 1938 he filed a divorce action in Florida, which was abandoned by

him (R. 41). In 1941 the respondent brought the action for divorce in Nevada and obtained a divorce decree, the validity of which is the issue involved in this proceeding.

During a period of seven years the respondent endeavored three times to obtain a divorce from his wife, without her participation in any one of the proceedings, and finally, at the end of seven years, succeeded in obtaining the divorce which is the subject of this proceeding. The two unsuccessful attempts on the part of the respondent to obtain a legal divorce—in Mexico and in Florida—prove conclusively that the domicile acquired by the respondent in Nevada was fictitious and was acquired for the sole purpose of obtaining a divorce in that state. To hold otherwise would be to close one's eyes to the true facts in the proceeding and the fraudulent intention of this respondent.

The record is replete with the respondent's own statements and evidence that while he was in Reno he still had his domicile either in Florida or Massachusetts. The fact is that the residence of the respondent in Reno immediately prior to the commencement of the divorce action by him was not more than two weeks, whereas the Nevada statute requires a minimum residence of six weeks. The Court below erred in adding to said period of residence of two weeks a previous residence which the respondent had in Nevada in the year 1940 since the record is barren of any credible evidence that the respondent at said time had intended to establish his domicile in Nevada.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its advisory powers and that to such end a Writ of Certiorari be granted and this Court review the decisions of the Courts below and finally reverse it.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

ARCHIBALD PALMER,
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ROSE W. SHAIN,

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PETITIONER'S REPLY BRIEF

The respondent, in his brief, argues that the petition for a writ of certiorari was not brought by the petitioner within the ninety day period as provided for in Section 237 of the United States Code, as amended, Title 18, Section 2101 (c). The respondent contends that in the instant case the ninety day period started on the 16th day of September, 1949 and not on the 19th day of September. The petitioner contends that the ninety day period started on the 19th day of September, 1949 because of the fact that the judgment was entered on the 19th day of September, 1949, as appears from the docket (new record page 57). The respondent's contention is based on a misconstruction of the law, as will be shown by an analysis of the cases cited by the respondent.

The respondent cites, on page 8 of this brief, six cases in support of his contention, as follows:

Gorman v. *Washington University,* 316 U. S. 98, 101.

Said case has no application whatsoever to the instant case since the only issue involved in that case was whether the judgment, the review of which was sought by a writ of certiorari, was a judgment of the highest court of the state from which such review could be had. This issue is not involved in the instant case.

In the following cases:

Monks v. *Lee,* 317 U. S. 590;
Bunn v. *Atlanta,* 317 U. S. 666;
Matton Steamboat Co. Inc. v. *Murphy,* 319 U. S. 412.

it is true that this Honorable Court dismissed the petition for a writ of certiorari or appeal in those cases upon the ground that the applications were not timely. However, the facts as reported in those cases do not show that the issue involved in the instant case was involved in those cases with respect to such untimely filing.

The only issue in the case of

Department of Banking of Nebraska v. *Pink,* 317 U. S. 264, 268.

another case cited by the respondent, was whether a timely petition for rehearing tolls the running of the three month period within which a petition for a writ of certiorari may be filed. Such issue is foreign to the issue involved in the instant case with respect to the timely filing.

The sole case cited by the respondent which has any bearing on the issue of timely filing as presented in the case at bar is *Cole* v. *Violette,* 319 U. S. 581, 582. However, a study of the facts in the *Cole* case, *supra,* will show that the facts in that case were different than those involved

in the instant case and had the facts been the same as those in the instant case the decision would have been otherwise.

In the *Cole* case, *supra,* the decree of the Supreme Judicial Court was dated the 4th day of December, 1942 and the rescript was filed in the Supreme Court on the same day. The Superior Court, however, did not enter *its own decree* until the 7th day of January, 1943; the application for appeal was made on the 6th day of March, 1943. The petitioner in the *Cole* case, *supra,* took the position that the time for the appeal started to run on the 7th day of January, 1943, on which day the Superior Court entered its own decree on the mandate. This Honorable Court held that the time to take an appeal did not run from the 7th day of January, 1943, the date of the entry of the judgment by the Superior Court, but from the 4th day of December, 1942, the date of the judgment of the Supreme Judicial Court, on which day a rescript was also filed in the Superior Court. The date of such filing, in the *Cole* case, *supra,* is analogous to the date of the filing of the rescript in the Probate Court in the instant case, to wit, the 19th day of September, 1949.

In the instant case it is not contended that the period of ninety days starts to run from the date of the entry of the decree of the Probate Court entered on the mandate. It appears from the docket of the Probate Court (new record page 57) that no such decree was ever entered by the Probate Court. The date of September 16th, 1949, nowhere appears in the docket; the only date which appears is September 19th, 1949, on which the rescript from the Supreme Judicial Court was filed, and said date, to wit, September 19th, 1949, also appears as the date that the decree of the Supreme Judicial Court was entered in the docket.

There is no question that the decree referred to in the last entry of the docket, to wit, under date September 19th, 1949 (new record page 57) is a decree of the Supreme Judicial Court. This is conceded by the respondent at page 7 of his brief.

Insofar as the brief of the respondent bears upon the merits of the petition, the writer is of the opinion that the facts and law as set forth in the petitioner's main brief cover the argument advanced by the respondent and, for the purpose of brevity, will not be repeated.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 485.

ROSE W. SHAIN,
Petitioner,

v.

MARK SHAIN,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FREDERICK W. MANSFIELD,
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Statement of the Case.

This is a petition for the issuance of a writ of certiorari to review the decree of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on the *16th of September, 1949* (not September 19, 1949, as stated in the petition, pp. 1 and 2), affirming the decree of the Probate Court of Norfolk County, Commonwealth of Massachusetts, which sustained the respondent's plea to the jurisdiction based on the validity of a Nevada divorce and dismissed the petition of the petitioner herein for separate support.

We adopt the statement of facts as contained in the petition with the following additions and corrections:

The respondent testified in the Nevada divorce proceedings that he had his name listed as an attorney at law in

Boston because Mrs. Shain (the petitioner) and her family propagated a rumor that he had been disbarred, and to avoid any questions and embarrassment he listed his name as an attorney at law (R. 44).

The respondent definitely established a domicile in New York City during the year 1931 and lived there until 1938. He voted in the City of New York for the years 1932 through 1936 (R. 10). He left New York City early in the year 1938, because of ill health, and went to Florida with the intention of establishing a domicile in that state. He established his domicile in the State of Florida in 1938, and lived there until September, 1940 (R. 11).

A copy of the "Voter's Registration of Qualified Voters, Miami Beach, Florida," shows Shain was a qualified elector in that city on March 21, 1939 (R. 11).

The respondent arrived in Reno on September 6, 1940, where he resided at the Parkway Hotel continuously until November 1, 1940 (R. 11).

During the interval between November 1, 1940, and June 18, 1941, at the suggestion of his physicians, the respondent left Reno on November 1, 1940, and, except for a few days in Nevada on three occasions, he traveled and visited extensively in southern California, Florida and Cuba (R. 14).

During his absence the respondent, on April 10, 1941, met with an accident which incapacitated him for some time (R. 13).

The Probate Court found that the respondent's health was poor, that he had been advised to seek a warm climate, and that he traveled since November 1, 1940, for the purpose of improving his health; that he was desperately trying to recover good health (R. 14).

The Probate Court also found that the respondent's absence from Reno between November 1, 1940, and June 18, 1941, "was expedient"; that on and after November 1,

1940, Shain (respondent) intended in good faith to return to Reno without delay and to continue his residence therein, and that he had continued his residence therein until the present; that on September 6, 1940, the respondent had given up his domicile in Massachusetts, New York and Florida; that he had never given up his Reno residence which he established on September 6, 1940, and that he had not acquired a new domicile; that he was a bona-fide resident (in good faith) of Reno on July 2, 1941, with a right, at that time, to file a complaint for divorce in the State of Nevada, and that the Reno divorce entered on August 12, 1941, was valid (R. 24).

The Supreme Judicial Court for the Commonwealth of Massachusetts found that the residence requirements of Section 6405 of the Nevada statutes were in truth complied with in that the judge of the Probate Court had found "on all the evidence" the husband's (respondent's) absence from Reno between November 1, 1940, and June 18, 1941, "was expedient" and that on and after November 1, 1940, the respondent intended in good faith to return to Reno without delay and to continue his residence therein; that, since the evidence on which this finding was made was not before them and the finding is not necessarily inconsistent with the subsidiary findings, that finding must stand; that the words "without delay," as contained in the Nevada Compiled Laws (1929), Section 6405, must be construed with considerable flexibility and with some reference to the reasons for absence; that one in search of health might actually "absent" himself for considerable periods and still entertain an intention in good faith to return without delay (R. 55, 56).

The Supreme Judicial Court for the Commonwealth of Massachusetts also found that, because the petitioner, who continued to reside in Massachusetts since the respondent left in 1931, did not appear or take part in the Nevada di-

vorce proceedings, and was served by substituted service in Massachusetts, the jurisdiction of the State of Nevada to grant the divorce therefore depended upon the husband (respondent in this case) having acquired a domicile in Nevada; and that the petitioner could attack the Nevada decree by showing that the husband had not acquired in fact a domicile in Nevada; that she had made that attack but had been unsuccessful, since the trial judge found with ample and consistent subsidiary findings that on September 6, 1940, nearly ten months before the respondent herein filed his suit for divorce in Nevada, he had arrived at Reno with the intention of establishing his domicile there and so had acquired a domicile which he has since retained, and that this finding does not now appear to be challenged (R. 53).

The decree of the Supreme Judicial Court for the Commonwealth of Massachusetts affirming the decree of the Probate Court of Norfolk County, Commonwealth of Massachusetts, was entered on the *16th day of September, 1949*, and *not on September 19, 1949*, as stated in the petition (R. 1, 2).

The record page numbers referred to in the petition are those of the transcript of the record filed in the Supreme Judicial Court for the Commonwealth of Massachusetts and are in a number of instances different from the page numbers of the transcript of the record of this Court. We therefore note the following corrections:

Petition, Page 2—Rec. pp. 8-24, should be Rec. pp. 7-26; Rec. p. 3, should be Rec. p. 2.

Page 3—Rec. p. 52, should be Rec. p. 51; Rec. pp. 8, 9, should be Rec. p. 8.

Page 4—Rec. p. 12, should be Rec. p. 11.

Page 5—Rec. p. 14, should be Rec. p. 13; Rec. pp. 23, 24, should be Rec. pp. 24, 25.

Argument.

Attention is called to the fact that this petition "prays that a writ of certiorari issue to review the decree of the Supreme Judicial Court of the Commonwealth of Massachusetts," whereas under the local (Massachusetts) practice it should be directed to the Probate Court for Norfolk County, Commonwealth of Massachusetts.

JURISDICTION.

Before considering the petition for writ of certiorari on its merits, we respectfully call to the attention of the Court that the petition has not been brought within the ninety-day period, as provided for in Section 237 of the United States Code as amended, Title 28, Section 2101, under which the jurisdiction of this Court is invoked, and should therefore be denied.

Section 237 U.S. Code as amended, Title 28, Section 2101(c), provides as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

No application for additional time has been requested or granted. The order of the Supreme Judicial Court for the Commonwealth of Massachusetts incorporated in its rescript was entered on the *16th day of September, 1949* (R. 56); and on the same day, to wit, September 16, 1949, the rescript was transmitted by the Clerk of the Supreme

Judicial Court to the Probate Court for the County of Norfolk, as appears by the following certified copy of the rescript and certified copy of the certificate of the Clerk of the Supreme Judicial Court, the originals of which have been filed with the Clerk of this Court by the respondent (see also the same date at the head of the opinion of the Supreme Judicial Court—R. 52):

"COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
AT BOSTON, September 16, 1949.

In the case of

ROSE W. SHAIN

vs.

MARK SHAIN

pending in the Probate Court for the County of Norfolk

Ordered, that the register of probate and insolvency in said county make the following entry under said case in the docket of said court; viz.,—

Decree affirmed.

By the court,

WALTER F. FREDERICK, Clerk.

September 16, 1949.

Brief statement of the grounds and reasons of the decision. See opinion on file.

A true copy,

Attest: WALTER F. FREDERICK

Clerk."

"Office of Clerk of the
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
1412 Court House, Boston 8

Walter F. Frederick
Clerk

Telephone
CA 7-0351

I, Walter F. Frederick, Clerk of the Supreme Judicial Court for the Commonwealth, hereby certify that the case Rose M. Shain, of Brookline in the County of Norfolk, against Mark Shain of Boston in the County of Suffolk, was presented before said court on May 3, 1949 and on September 16, 1949, a rescript therein was transmitted to the Probate Court for the County of Norfolk, a copy of which is hereto annexed.
In witness whereof I have hereunto set my hand and the seal of said Supreme Judicial Court this third day of January A.D. 1950.

WALTER F. FREDERICK
Clerk."

[Seal]

The date (September 19, 1949) appearing on the certified copy of the Probate Court for the County of Norfolk, attested to by Edgar W. Stiles, Assistant Register of that Court (R. 57), is the date when the rescript from the Supreme Judicial Court for the Commonwealth of Massachusetts was filed in the Probate Court for that county and the date when an entry was made on the docket of the Probate Court for Norfolk County that the decree had been affirmed by the Supreme Judicial Court for the Commonwealth of Massachusetts (R. 57). It is not the date of the rescript, which, as stated above, was September 16, 1949.

Ninety days from September 16, 1949 (the time provided for by U.S. Code, Title 28, Section 2101, *supra*), in which

the application for a writ of certiorari must be made, expired on Thursday, *December 15, 1949*. The petition was applied for on Saturday, *December 17, 1949*.

The petition having been applied for on December 17, 1949, ninety-two days after the entry of the rescript in the Supreme Judicial Court for the Commonwealth of Massachusetts affirming the decree of the Probate Court for the County of Norfolk, must therefore be denied, as it was not applied for within ninety days after the entry of the rescript in the Supreme Judicial Court for the Commonwealth of Massachusetts.

Gorman v. *Washington University*, 316 U.S. 98, 101.
Department of Banking of Nebraska v. *Pink*, 317 U.S. 264, 268.
Monks v. *Lee*, 317 U.S. 590.
Bunn v. *Atlanta*, 317 U.S. 666.
Matton Steamboat Co., Inc., v. *Murphy*, 319 U.S. 412.
Cole v. *Violette*, 319 U.S. 581, 582.

The question for the decision of the Court in the *Cole* case (*supra*) was whether the appeal was applied for within the three months' (now ninety days') period provided by law. This Court said:

> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript as the 'final decree' in the case. . . . But in determining what is a final judgment or decree within the meaning of § 237 of the Judicial Code, 28 U.S.C. § 344, we are not controlled by the designation applied to it in state practice. . . . The order of the Supreme Judicial Court of Massachusetts

incorporated in its rescript was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial Court."

The appeal was dismissed on the ground that it was not applied for within the time provided by law.

In the case of *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 268, this Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact finally adjudicated rights and that that adjudication is not subject to further review by a state court. . . . Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months [now 90 days] from the date when the finality of the judgment for purposes of review is established. . . . The petition for certiorari in this case must be denied for want of jurisdiction."

In the case of *Matton Steamboat Co., Inc.*, v. *Murphy, supra*, within three months after the judgment of the New York Court of Appeals the appellant made timely application for the allowance of an appeal to the Chief Judge of the New York Court of Appeals, who denied the same shortly after the expiration of the three months' (now

ninety days') period. On application to an Associate Justice of this Court, made shortly after the three months (now ninety days) expired, the appeals were allowed by him with the Court's approval in order that the Court might resolve the unsettled question of its practice.

The Court said:

> "By Rule 36 of our Rules, appeal to this Court from a state court of last resort may be allowed 'by the chief justice or presiding judge of the state court, or by a justice of this court.' But such an appeal may not be allowed when no application is made to the judge or justice authorized to allow it within the period prescribed by the statute. . . . The time within which such applications could be made is that prescribed by the statute. Its language is peremptory—'no appeal . . . shall be allowed or entertained unless application therefor be duly made within three months [now 90 days]. The purport of the words is that the appeal allowed must be one that is applied for within the three months [now 90 days] period. An application which has been made within that period and denied does not satisfy that requirement, nor does a later application filed after the time has expired even though it be allowed."

The burden to show affirmatively that this Court has jurisdiction upon application for review of a judgment of a State Court is upon the petitioner.

> *Gorman* v. *Washington University*, 316 U.S. 98, 101 (*supra*).

The application for the issuance of the writ of certiorari, not having been applied for within the ninety days' period provided by law, must be denied.

RESPONDENT NOT AN INHABITANT OF MASSACHUSETTS AT TIME HE WENT TO NEVADA.

The petitioner cannot under Massachusetts Law, G.L. (Ter. Ed.) Chapter 208, Section 39, question the validity of the Nevada divorce.

The respondent Shain definitely established a domicile in New York City during the year 1931, where he lived until 1938 (R. 10).

On December 19, 1931, when the petitioner's petition for separate support was filed in Suffolk County Probate Court, the respondent had already established a domicile in New York City which existed from September 1931 to 1938 (R. 10). That he never reacquired a Massachusetts domicile from the time he left in 1931 to the present time is shown by other findings in the Report of Material Facts. Thus it appears that he left New York City in 1938 because of ill health and established a residence in Florida, which existed from 1938 to 1940 (R. 11), and that on September 6, 1940, he had established a residence in Reno, Nevada, in "good faith," had not acquired a new domicile anywhere else since, and had a right on July 2, 1941, to file a complaint in the State of Nevada (R. 23, 24).

Massachusetts General Laws (Ter. Ed.) Chapter 208, Section 39, is as follows:

> "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

If the conditions recited in the first clause of this statute have been fulfilled, then Shain's divorce is valid. Under the second clause his divorce would be invalid in Massachusetts only if he was (1) an inhabitant of the Commonwealth of Massachusetts, who (2) went to Nevada to obtain a divorce, for (3) a cause occurring in Massachusetts while the parties resided in Massachusetts, or (4) for a cause which would not authorize a divorce by the laws of the Commonwealth of Massachusetts. The phrases numbered (2), (3) and (4) refer to and modify phrase (1) and are applicable only to an "inhabitant of the Commonwealth of Massachusetts."

(The finding in the report of facts (R. 24) that "on September 6, 1940 Shain had given up his domicile in Massachusetts, New York and Florida" does not mean that he was domiciled in Massachusetts up to that date. It means that "by" that date his Massachusetts domicile had been abandoned, because the actual establishment of a domicile in New York had been effected "during the year 1931, where he lived until 1938" (R. 10).)

An "inhabitant" means more than a resident, and imports domicile.

Heard v. *Heard,* 323 Mass. 357, 370.
Glass v. *Glass,* 260 Mass. 562, 565, and cases cited.

Retaining a telephone number or a mail-forwarding address, or occasional visits to parents or on business, would be wholly insufficient to constitute domicile, which "implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."

Williams v. *North Carolina,* 325 U.S. 226, 229.

The respondent testified, in the Nevada proceedings, that he maintained a Boston address and telephone directory listing as a member of the bar because his wife and her family spread a rumor that he had been disbarred (R. 44); and the Probate Judge found that he did not want to disclose to his family his actual "whereabouts" (R. 18, par. 4).

The respondent, having established a domicile first in New York in 1931, then in Florida, and finally in Nevada, cannot be said to have been an inhabitant of the Commonwealth of Massachusetts when he procured the divorce in Nevada, and it follows that the first part of the Massachusetts statute is applicable to him, and not the second part. The courts of the Commonwealth of Massachusetts could not enter a decree binding him personally and would have no power to order money payments unless he had been served with process *within* the Commonwealth of Massachusetts, although they would retain jurisdiction to determine the custody of minor children—a moot point in this case as all of the children were of full age before the trial in the Probate Court (R. 1, 9, par. 7).

Mosher v. *Mosher,* 293 Mass. 105.
Schmidt v. *Schmidt,* 280 Mass. 216, 220, 221 (overruling *Blackinton* v. *Blackinton,* 141 Mass. 432, 436).

GROUNDS FOR THE PRESENT PETITION.

The petition is based on the proposition that the Supreme Judicial Court for the Commonwealth of Massachusetts erred in upholding the finding of the Probate Court for the County of Norfolk to the effect that the Nevada divorce granted the respondent was valid, because (1) at the time the respondent brought his divorce proceedings he had not established and acquired a domicile in Reno for

a time sufficient to meet the minimum requirement of the Nevada statutes relative to divorce, and (2) the petitioner herein was served by constructive service, to wit, in person, in Massachusetts, and did not appear at the divorce proceedings in Nevada.

Validity of the Nevada Divorce.

(1) We respectfully urge that the Court did not err in holding that at the time the respondent brought his divorce proceedings he had established and acquired a domicile in Reno for a time sufficient to meet the minimum requirements of the Nevada statutes relative to divorce.

The pertinent Nevada statutes are:

3 Nevada Compiled Laws (Supp.) 1929, Sec. 6405.

2 Nevada Compiled Laws (Supp.) 1931-1941, Sec. 9460.

Sec. 6405 "Legal residence defined—proviso

"The legal residence of a person with reference to his or her right of suffrage, eligibility to office, right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, is that place where he or she shall have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him or her; *provided, however* should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence shall not be considered in determining the fact of such residence."

Sec. 9460 "SIX WEEKS RESIDENCE—CAUSES FOR DIVORCE

"Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have resided six weeks in the state before suit be brought, for the following cause, or any other causes provided by law:" (The causes are (1) impotency, (2) adultery, (3) desertion, (4) conviction of felony, (5) drunkenness, (6) cruelty, (7) neglect to provide and (8) insanity). (Effective May 1, 1931.)

Sec. 9467.06 In 1939 section 9460 was amended by section 9467.06 by adding the following cause of divorce:

"When the husband and wife live separate and apart for three consecutive years, without cohabitation, the court may in its discretion grant an absolute divorce at the suit of either party."

In section 9460, clause 8 (insanity), there is the following proviso:

"Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant a divorce unless either the plaintiff or defendant shall have been resident of the state for a period of not less than six weeks preceding the commencement of the action."

The trial judge found, to quote the opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (R. 53), "with ample and consistent subsidiary findings, that on September 6, 1940, nearly ten (10) months before the respondent filed his suit for divorce in Nevada, he had arrived at Reno with the intention of establishing his domicile there and so had acquired a domicile which he has since retained. This finding does not appear to be challenged."

The record is replete with testimony which amply warranted such a finding on the part of the trial judge (R. 7-52).

3 Nevada Compiled Laws (Supp.) 1929, Sec. 6405, *supra*, provides:

> "however, should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay to continue his residence, the time of such absence should not be considered in determining such residence."

The Probate Judge found as a fact that "Shain's [respondent's] health was poor and he had been advised to seek a warm climate. I am satisfied from all the evidence that Shain [respondent] had traveled since November 1, 1940, to improve his health, notwithstanding medical advice not to travel extensively. Shain [respondent] is desperately trying to recover good health" (R. 14). Shain's (respondent's) absence from Reno between November 1, 1940, and June 18, 1941, "was expedient" and on and after November 1, 1940, Shain (respondent) intended in "good faith" to return to Reno without delay and to continue his residence therein. "The Nevada judge so concluded. Shain [respondent] has continued his residence in Reno until the present" (R. 24).

Fleming v. *Fleming,* 36 Nev. 135. In this case it was said:

> "The first part of the statute of 1911 made actual, physical and corporeal presence necessary during all of the period for which residence is claimed; hence we think it was not the intention of the legislature to vary or modify that provision, but, on the other hand, in our judgment the legislative department by the proviso made provision for one who by urgent necessity was called from the jurisdiction of his residence, or who absented himself with the intention of returning without delay, or who returned without delay or as soon as the urgency had terminated."

In *Lamb* v. *Lamb,* 57 Nev. 421, 433, the Court held that—

> "the necessity of the physical presence of the plaintiff in Nevada and of the continuity of the six (6) weeks' period was passed upon by the Nevada Supreme Court which approved the following instructions to a jury:
>
> " 'The jury are instructed that where, in a divorce case, jurisdiction to grant a divorce is predicated upon the residence of the plaintiff, an essential element of that jurisdiction is that the plaintiff shall have been actually, physically and corporeally present, within the State of Nevada for a period of not less than six weeks preceding the commencement of the action; *but this period of six weeks need not be continuous.* If, after such presence within the State of Nevada, for a portion of six weeks, you find that the plaintiff absented himself from the State a short time with the intention in good faith to return without delay and continue his residence and thereafter did so return and thereafter continued such presence within the

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> " 'The jury are instructed that where, in a divorce case, jurisdiction to grant a divorce is predicated upon the residence of the plaintiff, an essential element of that jurisdiction is that the plaintiff shall have been actually, physically and corporeally present, within the State of Nevada for a period of not less than six weeks preceding the commencement of the action; *but this period of six weeks need not be continuous.* If, after such presence within the State of Nevada, for a portion of six weeks, you find that the plaintiff absented himself from the State a short time with the intention in good faith to return without delay and continue his residence and thereafter did so return and thereafter continued such presence within the

> State for such a time that the two periods of such presence aggregated preceding the commencement of this action a total of at least six weeks, then as a matter of law, the plaintiff was actually, physically and corporeally present within the State of Nevada, for a period of not less than six weeks preceding the commencement of the action'." (Italics ours.)

The Supreme Judicial Court for the Commonwealth of Massachusetts in dealing with this phase of the petitioner's appeal said (R. 55, 56):

> "In the present case we have an affirmative finding of intention in good faith to return without delay. It would seem that the words 'without delay' must be construed with considerable flexibility and with some reference to the reasons for absence. One in search of health might actually 'absent himself' for considerable periods and still entertain an 'intention in good faith to return without delay.'"

(2) The petitioner herein was served by constructive service, to wit, in person, in Massachusetts.

> "Article 4, Section 1, of the Constitution of the United States,"* to quote the language of this Court in the case of *Williams* v. *North Carolina,* 317 U.S. 287, at 293, "not only directs that 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State' but also provides that 'Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.'

*Set forth on page 8 of the petition for writ of certiorari of the petitioner.

> Congress has exercised that power. By the Act of May 26, 1790, c. 11, 28 U. S. C. 687, Congress has provided that judgments 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' "

In *Davis* v. *Davis,* 305 U.S. 32, 40, this Court stated that Art. IV, Section 1, in the Act of May 26, 1790, requires that "not some" but "full" faith and credit be given judgments of a state Court.

The question of the validity of a divorce in which service on the libellee is made by constructive or substituted service and where such libellee does not appear has been passed upon by this Court on numerous occasions.

Full faith and credit must be given a decree of divorce granted by the state of matrimonial domicile on constructive service against the other spouse who was a non-resident of that state.

Atherton v. *Atherton,* 181 U.S. 155.

A divorce decree by one state based on a finding that one spouse was *bona fide* domiciled in that state is entitled to full faith and credit even though the other spouse was a non-resident of that state, had been served by substituted service and did not appear in the divorce proceedings in that state.

Williams v. *North Carolina,* 317 U.S. 287.

In arriving at this decision in the *Williams* case the Court overruled the case of *Haddock* v. *Haddock,* 201 U.S. 562, and at pages 294, 295, said:

> "So far as *judgments* are concerned, the decisions, as distinguished from dicta, show that the actual ex-

> ceptions have been few and far between, apart from *Haddock* v. *Haddock*. For this Court has been reluctant to admit exceptions in case of *judgments* rendered by the courts of a sister state, since the 'very purpose' of Art. IV, § 1 was 'to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation.' "

We can see no reason for a reversal of the decision of this Court in the *Williams* v. *North Carolina* case, *supra*, and for a return to the rule as laid down in the *Haddock* v. *Haddock* case, *supra*.

The jurisdiction of the State of Nevada to grant the divorce depended, therefore, upon the respondent having acquired a domicile in Nevada.

Williams v. *North Carolina*, 325 U.S. 226.

In that case this Court held that a decree of divorce rendered in one court may be collaterally impeached in another by proof that the Court which rendered the decree had no jurisdiction even though the records of the proceedings of that Court purport to show jurisdiction, and held further that the decision of the Court in the first *Williams* v. *North Carolina* case did not foreclose a second trial upon the issue of domicile.

The contention of the petitioner that, even if the Court was to assume that constructive service on the petitioner would be due process, the Reno decree would still be invalid under the rule laid down in the second *Williams* case is unsound in that she bases her contention upon the assumption that the respondent had not acquired a domicile in Nevada and did not even comply with the residential re-

quirements, to wit, six weeks' residence in the State of Nevada before commencing his suit for divorce. This assumption is erroneous and is contrary to the finding of the Probate Judge as contained in the Report of Material Facts (R. 7-51), and the finding of the Supreme Judicial Court of Massachusetts (R. 55, 56).

We do not question that in accordance with the decision of this Court in the case of *Williams* v. *North Carolina,* 325 U.S. 226, the wife (petitioner) had a right to attack the validity of the Nevada decree by attempting to show that the husband (respondent) has not acquired in fact a domicile in Nevada. This she tried to do in the proceeding in the Norfolk County Probate Court, but was unsuccessful, since the Probate Judge, to quote the language of the Supreme Judicial Court of the Commonwealth of Massachusetts, has found (R. 53) "with ample and subsidiary findings that, on September 6, 1940, nearly 10 months before the husband filed his suit for divorce in Nevada, he had arrived in Reno with the intention of establishing his domicile there, and so had acquired a domicile which he has since retained."

Jurisdiction to grant a divorce may—indeed must—be based on a domicile of at least one of the parties.

> *Bell* v. *Bell,* 181 U.S. 175.
> *Bowditch* v. *Bowditch,* 314 Mass. 410, 414.

Schouler in his Divorce Manual expresses this rule as follows:

> "Under present decisions of the United States Supreme Court there can now be no question but that the husband has the right to change his domicile and acquire one in another state where he can obtain a valid divorce that must be recognized in the other states, if in making that change he acquired a bona fide domi-

cile, in that state to which he removes. This is so even though he leaves his wife without any right. It was so held in the first Williams decision. There is nothing in the second Williams decision to change that ruling. Indeed it seems to reiterate it."

Schouler's Divorce Manual (1945 Supp.), Sec. 31 (p. 51).
Williams v. *North Carolina,* 317 U.S. 287.
Williams v. *North Carolina,* 325 U.S. 226.

And where the defendant is a non-resident, Schouler has the following comment:

"In most of the states the fact that the defendant is not a resident will not prevent the court from taking jurisdiction. There are some exceptions to this rule. For example, in Utah it was held under the pertinent statute that it was essential that service be made upon the defendant within the territorial jurisdiction of the court where the divorce was sought on the ground of permanent insanity. With these few exceptions, however, in the absence of a statute to the contrary the plaintiff may obtain a divorce in the state of his or her domicile, particularly where this is the state of the matrimonial domicile, even though the defendant is a non-resident. This is so even though personal service within the state cannot be made on the defendant, but constructive service by publication or service without the state is necessary."

Schouler's Divorce Manual (Warren, 1944), Sec. 25 D, citing—
Minick v. *Minick* (1933), 111 Fla. 469.
Saul v. *Saul* (1941), 74 App. D.C. 287, 122 F. (2d) 64.

The question of domicile in the instant case is one of fact. This Court will not review findings of fact by a trial Court.

Since the decision of the Supreme Judicial Court of Massachusetts was based solely upon findings of fact made by the lower Court, it would not seem to be an appropriate proceeding for certiorari to review the decision of that Court. Subdivision 5 of Rule 38 of this Court provides for certain rules which, while not controlling nor fully measuring the Court's discretion, show the character of the reasons which will be considered for the issuance of the writ. Subdivision (*a*) of that paragraph provides:

> ". . . where a state court has decided a federal question of substance not theretofore determined by this court or has decided it in a way probably not in accord with applicable decisions of this court."

In *Deputy* v. *Du Pont,* 308 U.S. 488, Mr. Justice Roberts said:

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of reëxamining the correctness of the result."

It is quite apparent from a reading of the decision of the Supreme Judicial Court of Massachusetts that this case involves no important principle of law and no conflict of decisions among either state or federal courts, and that the writ is brought "for the mere purpose of re-examining the correctness" of the decision of the Supreme Judicial Court of Massachusetts. Since that decision was founded solely upon specific findings of fact by the Probate Court and did not deny full faith and credit to the Nevada decree, there is no substantial federal question not previously determined by the Court, nor did the Supreme Judicial Court of Massachusetts decide the case in a way not in accord with applicable decisions of this Court. It is obvious that the purpose of the petition in this case would be merely to ask the Court to review the correctness of the findings of the trial Court.

Conclusion.

It is respectfully submitted (1) that the petition for writ of certiorari was not applied for within the ninety days' period, as provided for in the United States Code, Title 28, Section 2101, and (2) that the Nevada Court had jurisdiction to grant the respondent a divorce and that the Supreme Judicial Court of Massachusetts was therefore obliged to give full faith and credit to the divorce decree of the Nevada Court. The petition must therefore be denied.

Respectfully submitted,

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